

Subchapter 66

Employee Records Management Policy

2.21.6601 INTRODUCTION (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, 5-13-309, MCA; NEW, 1979 MAR p. 34, Eff. 1/26/79; REP, 1981 MAR p. 1776, Eff. 12/18/81.)

2.21.6602 DEFINITIONS (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, 5-13-309, MCA; NEW, 1979 MAR p. 34, Eff. 1/26/79; REP, 1981 MAR p. 1776, Eff. 12/18/81.)

2.21.6603 POLICY (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, 5-13-309, MCA; NEW, 1979 MAR p. 34, Eff. 1/26/79; REP, 1981 MAR p. 1776, Eff. 12/18/81.)

2.21.6604 CLOSING (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, 5-13-309, MCA; NEW, 1979 MAR p. 34, Eff. 1/26/79; REP, 1981 MAR p. 1776, Eff. 12/18/81.)

2.21.6605 SHORT TITLE (1) This subchapter may be cited as the Employee Records Management Policy. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; AMD, 2007 MAR p. 612, Eff. 5/11/07.)

2.21.6606 POLICY AND OBJECTIVES (1) This policy:

(a) defines which records constitute employee records and establishes procedures for collecting and maintaining employee personnel records while protecting an employee's right of privacy under Article II, section 10 of Montana's constitution;

(b) ensures employee awareness of records held, provides employees access to their personnel records, and describes how employee personnel records may be corrected;

(c) provides minimum standards for employee records management and allows agencies to adopt supplemental employee records management procedures; and

(d) covers all positions in Montana's executive branch except elected officials, the personal staff of elected officials, those employed by the Montana University System and the Montana State Fund, and any other position specifically excluded under 2-18-103 and 2-18-104, MCA. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; AMD, 1992 MAR p. 1232, Eff. 6/12/92; AMD, 2007 MAR p. 612, Eff. 5/11/07; AMD, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6607 OBJECTIVES (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; REP, 1992 MAR p. 1232, Eff. 6/12/92.)

2.21.6608 DEFINITIONS As used in this subchapter the following definitions apply:

- (1) "Access" means viewing or using records.
- (2) "Confidential records" means records which, by law, are not public records.
- (3) "Employee personnel record" means information relating to an employee's employment with the state of Montana that is appropriate for preservation as an official record of employment policies, practices, and decisions. An employee personnel record may be a paper document or it may be information maintained in an information system such as the Statewide Accounting Budgeting and Human Resource System (SABHRS). Employee personnel records include the documents listed in ARM 2.21.6612.
- (4) "Genetic information" means information about applicants' or employees' genetic tests, the genetic tests of their family members, and the manifestation of a disease or disorder in their family members. Genetic information does not include information about an individual's sex or age. Records containing genetic information are listed in ARM 2.21.6613.
- (5) "Genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detect genotypes, mutations, or chromosomal changes.
- (6) "Records" means a body of recorded information. This information may be manually or electronically recorded and maintained. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; REP, 1992 MAR p. 1232, Eff. 6/12/92; AMD, 2007 MAR p. 612, Eff. 5/11/07; AMD, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6609 DOCUMENT REPORT (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; REP, 1992 MAR p. 1232, Eff. 6/12/92.)

2.21.6610 ADOPTION OF DEPARTMENT POLICY (REPEALED) (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1992 MAR p. 1232, Eff. 6/12/92; REP, 2007 MAR p. 612, Eff. 5/11/07.)

2.21.6611 ACCESS TO EMPLOYEE PERSONNEL RECORDS (TRANSFERRED) (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1992 MAR p. 1232, Eff. 6/12/92; AMD, 2007 MAR p. 612, Eff. 5/11/07; TRANS to ARM 2.21.6615, 2010 MAR p.1070, Eff. 4/30/10.)

2.21.6612 RECORDS THAT CONSTITUTE EMPLOYEE PERSONNEL RECORDS (1) Employee personnel records, both electronic and paper, include:

- (a) preemployment information (resumes, references, interview questions, etc.);
- (b) compensation, job history, and timekeeping records;
- (c) employee accident reports and worker's compensation claims;
- (d) I-9 forms;
- (e) W-4 forms;
- (f) benefit plans and employee medical records (including disability accommodation requests and supporting documents, and any record that contains genetic information);
- (g) performance appraisals;
- (h) disciplinary action records;
- (i) background check information;
- (j) office policies/documents signed by employee; and
- (k) awards and acknowledgements.

(2) Employee personnel records do not include documents, information, or other evidence developed as part of an investigation. If an investigation results in disciplinary action, the disciplinary action record is an employee personnel record. Investigations include, but are not limited to, grievances, violations of agency rules, policies, and procedures, or matters that may result in civil or criminal liability. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6613 RECORDS THAT CONTAIN GENETIC INFORMATION (1) The federal Genetic Information Nondiscrimination Act (GINA) provides that the following records contain genetic information:

- (a) an individual's genetic tests, including genetic tests done as part of a research study;
- (b) genetic tests of an individual's family members;
- (c) genetic tests of any fetus of an individual or family member who is a pregnant woman, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology;
- (d) an individual's family medical history; and
- (e) any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education).

(2) Examples of frequently used employee personnel records that may contain genetic information include Family and Medical Leave Act (FMLA) request forms, reasonable accommodation requests, medical certification tests, medically fit for duty forms, and records relating to worker's compensation claims. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6614 EMPLOYEE PERSONNEL RECORDS STORAGE (1) Agencies shall store employee personnel records as follows:

- (a) I-9 forms for all employees may be stored together, but must be kept separate from other records in a secured area such as a locked cabinet or drawer;
- (b) employee background check information must also be maintained separate from other records in a secure location such as a locked cabinet or drawer;
- (c) an employee's medical and genetic information may be kept in the same folder, but these folders must be stored and secured in separate locked cabinets or drawers from other personnel records as required by the Americans with Disabilities Act (ADA) and GINA;
- (d) all other employee personnel records, such as performance appraisals and preemployment information, must be stored in the employee's personnel file. These files must be stored in a secure location, such as a locked cabinet or drawer separate from other records; and
- (e) electronic employee personnel records must be stored in secure electronic folders and must be separated in electronic folders as outlined in this rule. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6615 ACCESS TO EMPLOYEE PERSONNEL RECORDS (1) All employee personnel records are confidential and access is restricted to protect individual employee privacy, except the following employee information which is considered public and must be released upon request:

- (a) an employee's name;
- (b) position title;
- (c) dates and duration of employment;
- (d) salary; and
- (e) claims for vacation, holiday, or sick leave pay, except that the reason for taking leave is confidential and may not be disclosed.

(2) Agencies may require that a request for information be in writing. Agencies may not require justification for a request.

(3) An employee has access to all of his or her employee personnel records. An employee may file a written response to information contained in the employee's personnel records. The employee's response must be filed within ten working days of the date on which the employee is made aware of the information by the agency. The written response becomes a permanent part of the employee's personnel record.

(4) As provided in the ADA and FMLA, access to medical information may not be disclosed except to:

- (a) supervisors and managers when identifying restrictions on the employee's work or duties or identifying necessary accommodations;
- (b) first aid and safety personnel, when appropriate, if the disability might require emergency treatment;
- (c) government officials investigating compliance with the ADA or FMLA; and
- (d) support an employee's compliance with the certification provisions of the FMLA.

- (5) As provided in GINA, genetic information may not be disclosed except:
- (a) to an occupational or other health researcher if the research is conducted in compliance with the federal regulations and protections provided for under the Protection of Human Subjects, 45 CFR, Part 46;
 - (b) in response to a court order, but only the genetic information expressly authorized by the court order may be disclosed and the employee must be informed before the disclosure;
 - (c) to government officials investigating compliance with GINA;
 - (d) to support an employee's compliance with the certification provisions of the FMLA; and
 - (e) to a federal, state, or local public health agency only regarding information about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee must be notified before the disclosure.
- (6) The Legislative Auditor's Division has access to employee personnel records under 5-13-309, MCA, for the purposes of auditing state agencies.
- (7) The Human Rights Bureau, Department of Labor and Industry, has access to employee personnel records directly related to discrimination complaints.
- (8) The professional staff of the State Human Resources Division has access to confidential records when gathering summary data on personnel programs or systems or when providing technical assistance to an agency.
- (9) Certain governmental entities have authority under state or federal law to access an employee's personnel record.
- (10) Other persons may access an employee's personnel record only if there is a job-related purpose, the employee has granted written permission, or if a valid court order grants access. An agency shall inform the employee when a valid court order has been received directing access to an employee's personnel record.
- (History: 2-18-102, MCA; IMP, 2-18-102, MCA; TRANS & AMD, from ARM 2.21.6611, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6616 EMPLOYEE PERSONNEL RECORDS USE (1) Nothing in this subchapter prohibits authorized users from relying on the content of employee personnel records as provided in this policy or in agency procedures when responding to requests for employment information from employers to which employees have applied for employment.

(2) Agencies may set and charge fees for copies of employee personnel records. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2010 MAR p. 1070, Eff. 4/30/10.)

2.21.6617 EMPLOYEE PERSONNEL RECORDS RETENTION (1) The Montana Secretary of State's Records and Information Management Division maintains a records retention schedule for payroll and personnel records. Most employee personnel records must be kept in the employer's office for three years after an employee terminates employment. The records must then be transferred to the state records center or retained within the agency for seven additional years. Some personnel records have different retention requirements, which are listed in the schedule.

(2) The GS5 payroll and personnel records schedule may be accessed via the Secretary of State's web site. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2010 MAR p. 1070, Eff. 4/30/10.)

Rules 2.21.6618 through 2.21.6621 reserved

2.21.6622 CLOSING (1) This subchapter shall be followed unless it conflicts with negotiated labor agreements or specific statutes, which shall govern to the extent applicable. (History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 1981 MAR p. 1776, Eff. 12/18/81; AMD, 2010 MAR p. 1070, Eff. 4/30/10.)